

Privacy Rights Clearinghouse

3100 – 5th Ave., Suite B
San Diego, CA 92103

Voice: (619) 298-3396 E-mail: bgivens@privacyrights.org
Fax: (619) 298-5681 Web: www.privacyrights.org

January 18, 2006

Secretary
Federal Communications Commission
445 12th St, SW
Washington, D.C. 20554
Submitted electronically: www.regulations.gov

**RE: FCC CG Docket No. 05-338
Junk Fax Prevention Act of 2005**

To the Secretary and the Commission:

The Privacy Rights Clearinghouse (PRC)¹ appreciates this comment opportunity, responding to the Federal Communications Commission (FCC or Commission) Notice of Proposed Rulemaking (NPRM) implementing provisions of the Junk Fax Prevention Act of 2005.²

We offer these comments in the interest of fundamental privacy rights. We also speak for a public that continues to be frustrated with the inability to stop the costly and annoying intrusions that unsolicited junk fax solicitations cause.

Fifteen years ago when Congress passed the Telephone Consumer Protection Act of 1991 (TCPA), it made what seemed an unambiguous declaration: Unsolicited advertisements to fax machines were prohibited without the recipient's prior express permission. Clear though it sounds, the public's efforts to stop unwanted fax solicitations have had a long and tortuous history. The matter has been reviewed by federal district and appeals courts. Consumers have sued, both individually and through class actions. Web sites have been established to guide consumers through the process of legal claims. The Commission itself has brought numerous enforcement actions and assessed huge fines. States have

¹ The Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy, medical privacy and identity theft, through a series of fact sheets as well as individual counseling available via telephone and email. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels.
www.privacyrights.org

² NPRM published at 70 Fed Reg 75102 (December 19, 2005)

passed laws prohibiting fax advertisements without prior consent.³ Still, unsolicited, unwanted fax advertisements keep coming and the public continues to complain.

Despite the clear message that consumers want unsolicited faxes stopped, junk faxing will almost certainly continue to be a problem. The Junk Fax Prevention Act of 2005 creates a loophole that will surely reverse even the modest progress made against unwanted junk faxes. Now junk faxes can be sent when the recipient has an “established business relationship” (EBR) with the sender. The law directs the Commission to issue regulations implementing the new law by April 5, 2006.

Granted, the Commission does not have authority to reverse the EBR loophole created by Congress. Still, the Commission can lessen consumer privacy invasions by narrowing the definition of EBR. The Commission should also establish strict standards of proof for a sender that claims an EBR exception. And, the Commission should not create an exemption to the opt-out notice requirement for faxes sent by nonprofit or trade associations.

EBR defined. The Junk Fax Prevention Act covers unsolicited fax advertisements sent to individuals as well as businesses. Both categories of recipients are included in the proposed definition of EBR. Otherwise, the definition of EBR the Commission proposes to incorporate into regulations is the same as that applied to telephone solicitations. The Commission seeks comment on whether to limit the EBR definition as applied to unsolicited facsimile advertisements.

Under the EBR definition as proposed, an unsolicited fax could be sent for 18 months following a purchase or three months following an inquiry about products or services. We do not agree with the Commission’s assessment that the 18-month and 3-month limitations strike an appropriate balance between industry practices and consumers’ privacy interests. Complaints about unsolicited fax advertisements are different from complaints about telephone solicitations.

In many ways, unwanted fax solicitations are more intrusive than unwanted telephone solicitations. Telemarketing calls must be made during specific daytime hours. Unsolicited faxes, on the other hand, can come at any time, day or night. It is not even necessary that the recipient have a fax machine to be awakened in the middle of the night by a broadcast fax. Off-hours intrusions such as this are particularly annoying to small business owners who operate offices within the home.

There is, in short, no relief from midnight fax calls – either with or without an EBR. This type of intrusion can only become worse. And, unlike telephone solicitations, consumers do not have a central do-not-call registry to stop unsolicited fax calls.

³ As the Commission is aware, a recent California law, introduced as SB 833, which does not include an EBR exception, is now stayed in federal district court. (Chamber of Commerce of the U.S. v. Lockyer, No. 05-CV-2257MCE, DC, CAED)

Furthermore, incorporating the same standard used for telephone solicitations does nothing to ease the transfer of costs associated with unwanted fax solicitations. This cost-shifting is another prime consumer complaint about unwanted faxes. Costs for most advertising are paid by the merchant. For fax advertisements, the recipient not only supplies the fax machine but also pays for paper, toner and lost time. Recipients also lose the use of equipment when fax machines are receiving unsolicited advertisements.

The Commission should not only limit the duration of the EBR, but should also eliminate the “inquiry” prong of the EBR definition. We are aware of no other situation where making a simple inquiry would establish a “business relationship.”

Burden of proof. An unsolicited fax based on an EBR may be sent if the recipient has “voluntarily” agreed to make the facsimile number available for “public distribution.” Agreement may be made in the context of the EBR or through a directory, advertisement, or Internet site. A fax advertisement based on an EBR can be sent as long as the sender had the recipient’s fax number *before* July 5, 2005. The Commission seeks comment on whether the burden should rest with the sender to establish consent as well as how the Commission should verify that a sender had a preexisting EBR.

The proposed rules do not create recordkeeping requirements for senders. Nonetheless, the only way to preserve any measure of consumer protection is to require the sender to produce proof of the EBR. Up until now, consumers and business owners who have received relief from unwanted fax solicitations have generally done so by filing lawsuits. The remedies afforded by the prior rule will be all but lost if recipients have to assume the burden of proving they had *not* purchased some product or service from the sender – or even a sender’s affiliated company – within the last 18 months. The standard of proof for the recipient is nearly *impossible* when a mere phone call or visit to a web site is enough to establish an EBR based on an inquiry.

Without some declaration of responsibility for proof of the claimed EBR exemption, the Commission’s enforcement actions will certainly suffer.

The Commission need not create an elaborate recordkeeping requirement for fax advertisers. The Commission need only require the party that claims the exemption to prove its claim. Businesses that choose to advertise by facsimile can then establish internal procedures for how to handle a potential challenge.

Exemption for nonprofits and trade associations. The NPRM seeks comment on whether the Commission should create an exception to opt-out notice requirements for nonprofit organizations and trade associations. With a regulatory exception, some organizations would not have to print opt-out instructions on faxes. The Commission should not create such an exception.

Privacy is generally defined as the right to control one’s personal information. This includes the ability to stop or control contacts such as unwanted advertising. Ideally, privacy protections are heightened within an *opt-in* scheme, that is, when permission is

required *before* personal information is shared or contact for marketing or other purposes is made.

Although far less preferable, an opt-out scheme still allows the recipient of an unsolicited fax some control. To eliminate an opt-out choice entirely when a fax is sent by a nonprofit or trade association would deprive the recipient of any control. A requirement to print an opt-out telephone number on a fax transmittal should not be overly burdensome, even for the smallest association.

Again, we appreciate the opportunity to comment on the FCC's proposed rules implementing the Junk Fax Prevention Act of 2005. We urge the Commission, as the primary enforcer of consumer rights to stop unwanted fax advertisements, to approach this rulemaking in a manner most favorable to consumers rather than the business interests that moved this legislation through Congress. In balancing competing interests, the Commission should recognize that consumers have lost a great deal with the EBR exception.

As the Commission is no doubt aware, consumer complaints about unwanted fax advertisements have not stopped. To the extent of its authority, the Commission should provide itself and the public with the tools to continue the fight against unwanted fax advertisements.

Sincerely,

A handwritten signature in cursive script that reads "Beth Givens".

Tena Friery, Research Director
Beth Givens, Director
Privacy Rights Clearinghouse